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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 153.

SAINT LO CONSTRUCTION COMPANY, INC., A Corporation,
Petitioner,

v.

LAWRENCE KOENIGSBERGER, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW.

The findings of fact, conclusions of law and opinion of the U. S. District Court for District of Columbia are not reported. The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 174 F. (2d) 25 (1949).

JURISDICTION.

Petitioner invoked the jurisdiction of this Court by filing a petition for a writ of certiorari pursuant to the provisions of 28 U. S. C., Sec. 1254.

STATEMENT OF THE CASE.

The statement of facts set out in the petition is so replete with inaccurate statements concerning the proceeding below, and on the other hand, omits so many facts relevant and material here, that a recasting of the statement seems essential in order to bring to light the simple issues presented for consideration.

The matter at hand concerns a covenant against apartment houses and stores in the subdivision known as "Chevy Chase, D. C." (R. 52).

Chevy Chase, D. C. is a subdivision in Washington, D. C., consisting of all the land in four squares with the exception of part of one lot which belongs to the District of Columbia. The subdivision is bounded by Morrison Street on the south, Connecticut Avenue on the west, Chevy Chase Circle on the north and Chevy Chase Parkway on the north and east (R. 52).

Since 1907, when the subdivision was created subject to the covenant above referred to, three efforts made to nullify the covenant have resulted in litigation prior to the present action—in 1919, in 1934 and 1943. In all three instances, the validity and enforceability of the very covenants involved in this action were sustained. *Chevy Chase Land Company* v. *Poole*, 48 App. D. C. 400 (1919); *Kenealy* v. *Chevy Chase Land Company*, 63 App. D. C. 327, 72 F. (2d) 378 (1934); *National Metropolitan Bank* v. *Zarin et al.*, Civil Action 12744 (D. C. 1944). Accordingly, the subdivision "Chevy Chase, D. C." is today an exclusively residential area containing no apartment houses or stores (R. 55).

The case of *National Metropolitan Bank* v. *Zarin et al.*, is highly relevant to the present action. The material allegations of the complaint in the case are as follows:

"(6) Since the establishment of said covenants, the conditions in the neighborhood thereby affected have radically changed, as is hereinafter set forth; that many of the defendants recognize that these changes have taken place and that it is now inequitable to enforce said covenants as to the plaintiff's property; that a number of the defendants have signed a paper writing consenting to the construction of an apartment house upon her property, a copy of which writing marked "Exhibit A", is hereto attached and made a part hereof.

"(7) At the time of the establishment of said covenants the neighborhood in question was distinctly suburban; it was a select residential section free of commercial enterprises and structures of any and every description. However, that part of the neighborhood facing Connecticut Avenue has undergone a complete change; immediately to the West of plaintiff's property is a bus terminal, and the Connecticut Avenue frontage of the three blocks lying to the South of said terminal are all used for commercial purposes; that apartment houses are now located along the Connecticut Avenue front of the two blocks lying to the South of said commercial area; that immediately to the South of the plaintiff's property is a large public school; that along the Connecticut Avenue front of the fourth square to the South of plaintiff's property there are a number of apartment houses. To the North of the plaintiff's property there are two large churches and an apartment house.

"The plaintiff's property has been and now is zoned Residential 60 "C", and under the Zoning Laws, and regulations passed pursuant thereto, can be used for apartment house purposes.

"(8) There is a great amount of automobile and bus traffic passing the plaintiff's property and this, with the other conditions herein enumerated, render her property entirely unsuitable for private residence purposes. The plaintiff has endeavored to rent or sell her property, but it unable to obtain a fair rental or fair

price for the property, as under present conditions, there is no demand for her property. Her home is large and costly to maintain; she is financially unable to maintain said property as it should be maintained and if the restrictions are continued the result will be that the property will be subject to tremendous deterioration, will become in a condition of great disrepair, will become a derelict and an eye sore to the community, which condition will tend to decrease the values of properties in this neighborhood.

"(9) The aforesaid covenants have heretofore been violated, in that in the said subdivision a school and a church have been constructed; that though the property upon which the aforesaid bus terminal was constructed is not within said subdivision, yet our Court of Appeals in the case of *Chevy Chase Land Company* v. *Poole*, 48 App. D. C., 400, held it was subject, as a matter of law, to said covenants for the benefit of said subdivision, and yet within the last year a bus terminal or station has been constructed upon said property. The defendants should now be estopped from enforcing said covenants as to the plaintiff's property."

The findings of fact made in the instant case in connection with the *National Metropolitan Bank* action are as follows (R. 53, 54):

"On September 5, 1941, Ellen T. McReynolds, then the owner of the property now owned by the defendant, as plaintiff, brought an action in this Court against all of the then other owners of property in Chevy Chase, D. C., including the plaintiffs and interveners herein or their predecessors in title, as defendants. The complaint in that action averred that since the establishment of the covenants set forth in Finding Number 5 hereof, the conditions in the neighborhood thereby affected had radically changed in many respects thereinafter recited. The prayers of the Complaint were (1) that the covenants hereinabove referred to be set aside, vacated or annulled as to the property now owned by the defendant hereto, (2) that the covenant providing that no apartment house shall be erected upon said property be set aside, vacated or annulled as to said property of the defendant hereto, (3) that the defen-

dants to that action be enjoined from interfering with the construction of an apartment house upon said property of the defendant hereto, (4) that a declaratory judgment be entered decreeing that said property of the defendant hereto is not subject to said covenants, or any of them, and (5) for general relief. Said former action was entitled 'Ellen T. McReynolds, Plaintiff, v. Jacob Zarin et al., Civil Action Number 12744'. While that action was pending the property of the defendant hereto was acquired by the National Metropolitan Bank and said Bank was thereupon substituted for McReynolds as plaintiff in that action. The averments of the complaint above referred to raise the precise question which has been brought before the court in the instant case and relate to the very property here in issue. The answers in Civil Action 12744 put that question dominently in issue. The pre-trial order in that case, signed by the attorneys for the plaintiffs and the defendants indicates that that issue was the only issue presented to the court. It recites as follows:

'Plaintiff claims to be the owner of certain lots in the District of Columbia which are part of a subdivision, and that it is entitled to have the restrictive covenant set aside because of changes in the neighborhood and because of change in the use of properties in the neighborhood, because it would be inequitable to enforce the covenant because of such change.'

That action was thereafter tried before Justice Bailey of this Court, without a jury, on its merits, on testimony taken in open court. That trial was concluded in December, 1943, and a judgment dismissing the complaint was signed by Justice Bailey on June 14, 1944. The record does not disclose that Justice Bailey made any findings of fact or entered any conclusions of law; the issue above referred to, however, was necessarily presented in the pleadings of the case and the only real controversy in National Metropolitan Bank v. Zarin was as to what changes had occurred and whether or not such changes were sufficient to cause the Court to believe it would be inequitable to enforce the covenants."

Nine months after the entry of judgment in the *National Metropolitan Bank* case, the petitioner, a new Delaware corporation, contracted to purchase the property which was the subject of that action with full knowledge of the covenants, the proceedings in Civil Action 12744, the history of prior litigation and the physical condition of the property and surrounding properties (R. 42). The petitioner's acknowledged purpose in purchasing the property was to erect an apartment house and stores. The purchase price was $68,000, of which petitioner paid $1,000 in cash and gave its note, secured by deed of trust for the other $67,000 to a straw for the National Metropolitan Bank, plaintiff in the former case and petitioner's predecessor in title (R. 42, 54). On May 3, 1947, the petitioner announced that it intended to proceed with the construction of an apartment house and stores on the property (R. 22) and the action below was promptly instituted on May 8, 1947. (R. 2, 6.)

Respondents here (plaintiff and plaintiff interveners below) are property owners in "Chevy Chase, D. C." who sought to enforce the covenants. All interveners actually participating in the case (R. 51) supported the original plaintiffs.

In the present proceeding, the defense of the petitioner to the action for injunction was based upon alleged changes in the neighborhood between 1907 (the date of the creation of the subdivision) and 1947 (the date of the present action) which it was alleged made inequitable the enforcement of the covenants against it (R. 17-25). It has been the position of the respondents throughout these proceedings that the judgment in the *National Metropolitan Bank* case was res judicata of that issue in this proceeding so far as changes in the neighborhood prior to the time of the trial of that action affected the validity and enforceability of the covenant and that accordingly the burden was upon the petitioner to establish some material change in the neighborhood since the time of the trial of the former case in December, 1943, before the petitioner could go behind

the judgment in the former case to show the cumulative effect of all the changes between the time of the creation of the subdivision and the institution of the present action. The respondents pointed out below that, if this were not the case, the petitioner would merely be retrying exactly the same case disposed of after a two-week trial in 1943. On the opening statement on behalf of petitioner in the trial court, after its counsel had explained the case of *Hurd* v. *Albert*, 214 Cal. 15, 3 P. (2d) 545 (1931), the following colloquy took place betwen the court and counsel for petitioner (R. 58):

> By Mr. Keane: * * *
>
> The Court further said that the doctrine of res judicata was never intended to operate so as to prevent a re-examination of the same question between the same parties, where in the interval between the first and second occasions the facts have materially changed, or new facts have occurred which may affect the legal rights of the litigants.
>
> The Court: That is just where Mr. Fischer stands. He says you must proceed in the first instance by showing a change since the judgment of June 14, 1944.
>
> Mr. Keane: I agree with that. I have no contest with that point . . .

And at a later point (R. 60-62):

> The Court: When did the defendant acquire this property?
>
> Mr. Keane: He acquired the property in April—he acquired it in December, 1945, just two years after the previous litigation.
>
> The Court: With knowledge of the covenant?
>
> Mr. Keane: Yes sir.
>
> The Court: And with knowledge of the judgment entered by Judge Bailey in June, 1944?
>
> Mr. Keane: Well, I will answer that in this way: He came to me for advice. I wanted to look at the decision. I found no allegations in the bill, and I so advised him, so he did it with knowledge.
>
> The Court: Now, if I understand your position, you admit the existence of the covenant?

Mr. Keane: I admit it, yes, sir.

The Court: If I understand you, you would agree that the plaintiffs should have the relief here asked unless you are able to establish the defense?

Mr. Keane: Yes, sir.

The Court: Which you have?

Mr. Keane: I will assume the entire burden of proceeding, on the basis that it would create an equitable thought in Your Honor's mind.

The Court: That would mean that you would have the burden of establishing one of your contentions, otherwise the plaintiffs would be entitled to the relief asked?

Mr. Keane: Yes, sir; the entire burden of proceeding is on this defendant, Your Honor.

The Court: That will mean that you will proceed with your witnesses?

Mr. Keane: Yes, Your Honor.

* * *

Mr. Keane: Your Honor, I will have my first witness available, whenever Your Honor indicates.

The Court: At 1:30. I will limit the testimony, for the present, to changes in the neighborhood since June 14, 1944.

Mr. Keane: To facilitate the defense, Your Honor, the trial took place in December, 1943.

The Court: Was not the judgment in June, 1944?

Mr. Keane: But it was nunc pro tunc. The witnesses in 1943 must have testified to what existed at that time.

The Court: When was it submitted to Judge Bailey?

Mr. Keane: In December, 1943, was it not?

Mr. Fischer: The trial was closed and submitted to Judge Bailey in December, 1943. The judgment was signed and entered on June 14, 1944.

The Court: I think perhaps it would be better to go back to the first day of December, 1943, and that will be—

Mr. Keane: Your Honor, I hate to press the point, but would this be agreeable to the Court: We are going to have the testimony transcribed and made available to Your Honor. Some of the witnesses will testify from 1908 to 1943. I will certainly make every effort

to hold them to the time as of 1943, but rather than recall witnesses, if Your Honor happens to feel that it should be available, could not Your Honor separate it in our final arguments? It is only a question of one or two witnesses.

The Court: No, I think I would rather make it definite; and if later on you are privileged to open up the earlier years, you may recall the witnesses.

Mr. Keane: All right, Your Honor.

Counsel for petitioner did not object to the ruling of the trial judge after the opening statements; he did not claim that the ruling of the trial judge placed him at a disadvantage in presenting his defense; and he did not ask for a continuance.

After three days of trial, in which counsel for petitioner attempted to meet the burden which was properly his and which he had assumed in his opening statement, respondents moved for judgment on the ground that petitioner had failed to sustain that burden. The motion was granted and the ruling was accompanied by the oral opinion set out in the record at page 215. This judgment was affirmed by the United States Court of Appeals for the District of Columbia Circuit (R. 225), 174 F. (2d) 25.

ARGUMENT.

None of the reasons which ordinarily are considered by this Court to justify the grant of certiorari exists in this case, which involves merely the application of local law to a restrictive covenant affecting real estate in the District of Columbia—devoid of any federal, constitutional or statutory aspects, and wholly lacking in questions of federal or other public interest.

In an effort to impart to its application the flavor of a federal question, petitioner stresses the contention that the trial court and the Court of Appeals misconstrued rule 52(a), F.R.C.P., in applying the doctrine of res judicata or collateral estoppel to the judgment entered in previous litigation between the same parties (or their privies) in

which the trial court, after trial without a jury, had omitted to find the facts separately, as required by that rule. It is petitioner's contention that without such findings, the former judgment cannot give rise to either doctrine.

It has never been the law that findings of fact were essential to the conclusiveness of a judgment, else no judgment entered on the general verdict of a jury could ever have had that quality. Prior to 1930, there was neither federal statute nor rule of court which required such findings in either jury or non-jury cases. In *Railroad Commission* v. *Maxcy*, 281 U. S. 82, 74 L. Ed. 717, this Court pointed out the importance of findings of fact in order to enable appellate courts to understand the basis of the decision to be reviewed. That case was decided on March 12, 1930, and on June 2, 1930, this Court amended the Federal Equity Rules by adding rule 70-1/2 (effective October 1, 1930), 281 U. S. 773. That rule required findings of fact in equity cases, and their inclusion in the record on appeal. It is fair to assume that the purpose of this Court in the promulgation of the rule was to correct the unsatisfactory situation illustrated by *Railroad Commission* v. *Maxcy*.

The substance of rule 70-1/2 was embodied in rules 52(a) and 75(g), F.R.C.P. The purpose of both rules was to improve and facilitate appellate review. It was so stated in the note of the Advisory Committee commenting on the rule, and it has been so held in a numbe. of decisions, including *Interstate Circuit* v. *United States*, 304 U. S. 55, 56, 82 L. Ed. 1146 (1936); *United States* v. *Forness*, 125 F. (2d) 928, 942 (C.C.A. 2d, 1942); *Goodacre* v. *Panagopoulos*, 110 F. (2d) 716, 72 App. D. C. 25 (1940); *Hurwitz* v. *Hurwitz*, 136 F. (2d) 796, 78 App. D. C. 66 (1943).

In the report of the Advisory Committee accompanying the proposed 1948 amendment of rule 52(a), it is stated that findings of fact "not only aid the appellate court on review, *but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment*" (emphasis supplied). The italicized phrase did not accompany the rule as originally promulgated, and it

was not germane to the 1948 amendment, which only amended the rule so as to provide that it should be applicable to cases tried with an advisory jury, that it should be sufficient if the findings of fact and conclusions of law appear in the opinion or memorandum of decision, if any, and that such findings were unnecessary on decisions of certain motions.

Since the adoption of rule 52, the decisions of the courts have been clear that findings of fact are not even essential for the purposes of appeal and a case will not be remanded for such findings where the record is clear. *Woodruff* v. *Heiser,* 150 F. (2d) 869 (C.C.A. 10th, 1945); *Burman* v. *Lenkin Construction Co.,* 149 F. (2d) 827, 80 App. D. C. 125 (1945); *Rossiter* v. *Vogel,* 148 F. (2d) 292 (C.C.A. 2d, 1945); *Hurwitz* v. *Hurwitz,* 136 F. (2d) 796, 78 App. D. C. 66 (1943); *Goodacre* v. *Panagopoulos,* 110 F. (2d) 716, 72 App. D. C. 25 (1940). Since the adoption of rule 52, it has also been held that the parties may waive findings of fact if an appeal is not taken. *United States* v. *Institute of Carpet Manufacturers of America, Inc.,* 4 F. R. Serv. 52a.16, Case 3, 1 F.R.D. 636 (D.C.S.D.N.Y. 1941). And since the adoption of rule 52, it has been held that findings of fact are clearly not essential to the conclusiveness of a judgment for the purposes of the doctrine of res judicata or collateral estoppel. *Gill* v. *Gill,* 147 F. (2d) 154, 79 App. D. C. 357 (1945).

In this background, the most that can be said is that such findings might under some circumstances be of assistance in the application of the doctrines of res judicata and estoppel by judgment—not that they are indispensible thereto. In the instant case, they are not even a factor, because neither findings of fact nor evidence aliunde the record are required to make crystal clear the issues of fact involved and the scope of the decision of the former litigation. The trial judge in the instant case made detailed findings of fact on the matter leaving no doubt that the record of the former action was clear for this purpose, and the opinions

in the Court of Appeals are in full agreement as to the facts which were determined in the former action. The attempt of the petitioner to make it appear that disagreement existed in the court below on this point is entirely misdirected. Indeed, the purport of that litigation was so clear that the petitioner's predecessor in title neither requested findings nor appealed.

Accordingly, the federal question which the petitioner attempts to raise involving the interpretation of rule 52(a), F.R.C.P., is wholly imaginary. Likewise, the federal question the petitioner seeks to raise under rule 16, F.R.C.P. is frivolous, for the views held by a pre-trial judge are surely not binding upon a Court of Appeals reviewing on the merits the determination of the trial judge. *Messinger* v. *Anderson*, 225 U. S. 436, 56 L. Ed. 1152 (1911). What the petitioner here really asks is a review of the findings of fact of the trial judge in a case involving only local real estate law where these findings have already been examined and affirmed under the applicable local law by the United States Court of Appeals for the District of Columbia Circuit.

CONCLUSION.

The decision below is correct and presents no federal question of importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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